Supreme Court, U.S.
FILED
MAR 11 1997
OFFICE OF THE CLERK

No. 96-1207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STERLING S. MILLER; CLARENCE WOODRUFF; PAULA J. CARTER; WILLIAM L. CLAY, JR.; and KENNETH JONES,

Petitioners,

v.

VINCENT C. SCHOEMEHL, THOMAS A. VILLA, BOARD OF ALDERMEN OF THE CITY OF ST. LOUIS, BOARD OF ELECTION COMMISSIONERS OF ST. LOUIS CITY, and CITY OF ST. LOUIS, a municipal corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

There is no right more fundamental in Anglo-American jurisprudence than the right to be heard, the right to have "one's day in court." None of the petitioners was a party to the prior, ostensibly precluding, litigation, and their attempt to participate in that litigation through a motion to consolidate was opposed by defendants and denied by the trial court. Nevertheless, the Eighth Circuit held that these "strangers" to the prior litigation are barred by *res judicata* from pursuing their own lawsuit. This is an unprecedented application of *res judicata* to a nonparty, and it was accomplished under the rubric of "virtual representation," a theory over which the courts are in conflict and which raises fundamental due process issues. Respondents' unwillingness to confront these issues candidly or to even attempt to defend the Eighth Circuit's decision on its own terms is clear testimony to the need for review by this Court.[1]

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[1] Respondents question, for the first time and without supporting argument (RB at 3 n.4), whether petitioners Clay and Jones were proper parties before the Eighth Circuit or have "standing" to join in this petition, because the trial court denied as moot the *Miller* plaintiffs' motion to file an amended complaint that, *inter alia*, added them as named plaintiffs. We note, first, that petitioners appealed the trial court's order (119-21), and second, that respondents do not question the standing of the other three petitioners, Miller, Woodruff, and Carter.

A. AS THE EIGHTH CIRCUIT CORRECTLY STATES, THE CIRCUITS ARE "SHARPLY DIVIDED" AS TO THE CONSTITUTIONALITY AND SCOPE OF "VIRTUAL REPRESENTATION" AS A STANDARD FOR NONPARTY PRECLUSION.

Respondents assert that the decision below "did not enhance or create conflict with other circuits" (RB at 5). This suggestion is frivolous. The Eighth Circuit itself explicitly acknowledges that the courts are "sharply divided" over the scope and constitutionality of the theory of virtual representation as a standard for nonparty preclusion (App. A-12). The split is fully discussed in the Petition (at 11-15), and in the majority opinion below (App. A-11-13). To reiterate briefly, the threshold question over which the circuits are divided is whether

> [v]irtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues.

Pollard v. Cockrell, 578 F.2d 1002, 1008 (5th Cir. 1978). The Eighth Circuit expressly rejected the other circuits' requirement of an express or implied legal relationship of accountability, opting instead for a standardless inquiry into whether *res judicata* applies (App. A-12). None of the petitioners has the kind of express or implied relationship of accountability with a party to the *AAVR* lawsuit that the other circuits have required. *See* Petition at 13-14.

Thus, this case presents a pure legal issue, over which the circuits are sharply divided, namely, whether, under the theory of "virtual representation," the federal common law doctrine of *res judicata* can bar a plaintiff from pursuing a claim that was litigated in a prior proceeding

where the plaintiff was neither a party nor in a legal relationship of accountability with a party to the prior proceeding. Respondents' brief does not address this issue. Instead, respondents seize on the Eighth Circuit's standardless approach to argue that it can somehow be limited to the facts of this case (RB at 5, 8). To the contrary, the Eighth Circuit's approach applies whenever the interests of the two parties are ostensibly aligned. Indeed, it is the recognition of this fact that caused the Fifth Circuit in *Pollard* to abandon its initial broad application of the theory of virtual representation as being inherently in conflict with due process.[2]

In sum, this case is not about the factual application of the doctrine of *res judicata*, it is about the governing legal and constitutional standards for applying the doctrine.

B. THE EIGHTH CIRCUIT'S HOLDING THAT PETITIONERS WERE ADEQUATELY REPRESENTED IN THE *AAVR* LAWSUIT BECAUSE THE *AAVR* PLAINTIFFS HAD AN INCENTIVE TO LITIGATE THEIR COMMON CLAIMS, DESPITE THE FACT THAT THEY FAILED TO DO SO WITH DUE DILIGENCE, IS AT ODDS WITH THE TEACHINGS OF THIS COURT SINCE *HANSBERRY v. LEE*.

Even if the Eighth Circuit were correct in holding that a plaintiff can be bound by a prior judgment despite the fact that he or she was neither a party nor in a legal

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[2] Respondents' superficial treatment of the applicable law in the Fifth Circuit (RB at 6) disregards *Pollard, supra*, which explicitly limited the broad holding of *Aerojet* on which respondents rely.

relationship of accountability with a party to the prior lawsuit, due process requires that the plaintiff's interests be "adequately represented" in the prior lawsuit. The standard articulated by this Court is that the prior litigation must have been "so conducted as to insure the full and fair consideration of the common issue." *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). The majority opinion ignored *Hansberry* and its progeny and concluded that adequacy of representation exists when "the interests of the two parties are very closely aligned and the first party had a *strong incentive* to protect the interests of the second party" (App. A-16, 20).

Respondents make no attempt to defend or support the Eighth Circuit's "incentive to litigate" standard. Instead, they contend that there is no basis for petitioners' position that the prior lawsuit was not prosecuted "with due diligence and reasonable prudence" (RB at 8). Their contention is contradicted by the same Eighth Circuit panel's finding, in the *AAVR* appeal, that the neglectful failure of the original lawyers to file a memorandum and appropriate documentation in response to defendants' summary judgment motion was not "excusable." *African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1350-51 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 913 (1996). That finding necessarily means that the original lawyers did not prosecute the case with due diligence and reasonable prudence.

Respondents also assert that petitioners were adequately represented by the *AAVR* plaintiffs because their counsel "pursued the first suit through appeals" (RB at 8). The courts have uniformly held, however, that the presence of common counsel is not a basis for invoking

res judicata.[3] *See, e.g., Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 759 (1st Cir. 1994); *Pollard v. Cockrell*, 578 F.2d 1002, 1009 (5th Cir. 1978); *Petit v. City of Chicago*, 766 F.Supp. 607, 611-12 (N.D.Ill. 1991).

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[3] In an effort to divert attention from the constitutional issues presented in this case, respondents raise factual matters that are simply irrelevant. First, Mr. Miner was not counsel in *AAVR* when this lawsuit was filed, as respondents state (RB at 2). *See* Petition at 3-5. But, as the cases cited in the text make clear, it would not matter if he had been. Second, as the majority opinion correctly observed, the admitted purpose of the Bosley plaintiffs in joining the *Miller* action was to "circumvent trial strategy disagreements" and a conflict with their initial attorneys (App. A-19; *see* Petition at 3), not, as respondents assert, to "evade judgment in the first suit" (RB at 7). This action was in fact filed before the motion for summary judgment in *AAVR* had even been briefed. However, even if the Bosley plaintiffs had joined this action to evade the result in *AAVR*, it is irrelevant to the question whether *res judicata* was properly applied *to petitioners*, none of whom was at any time a party to *AAVR* and who attempted to consolidate the two cases. *Cf. Gonzalez v. Banco Cent. Corp.*, 17 F.3d 751 (1st Cir. 1994) (*res judicata* under virtual representation theory inappropriate where plaintiffs' attempt to join the first litigation was opposed by defendants and denied by the trial court, even though the same counsel represented plaintiffs in both actions).

C. IF PLAINTIFFS CAN BE BARRED FROM PURSUING A CLAIM BECAUSE IT WAS LITIGATED IN A PRIOR PROCEEDING BY PARTIES WITH WHOM THEY HAD NO LEGAL RELATIONSHIP OF ACCOUNTABILITY AND WHO FAILED TO PROSECUTE WITH DUE DILIGENCE AND REASONABLE PRUDENCE, THEN DUE PROCESS DEMANDS THAT THE PLAINTIFFS FIRST RECEIVE NOTICE THAT THE PRIOR PROCEEDING WOULD CONCLUSIVELY DETERMINE THEIR RIGHTS AND BE GIVEN THE OPPORTUNITY TO JOIN IN OR OPT OUT OF THE LAWSUIT.

It is undisputed that none of the petitioners received notice that their rights were to be adjudicated in *AAVR*. Although the case was filed as a class action, no class was certified; indeed, no motion to certify a class was even filed. It is also undisputed that petitioners had neither an opportunity to choose not to be represented by the *AAVR* plaintiffs (that is, to "opt out") nor an opportunity to participate in the litigation (their motion to consolidate the two cases was opposed by respondents and denied by the district court). The Eighth Circuit nevertheless held that petitioners received constitutionally sufficient notice of the prior proceeding because they were aware that the lawsuit existed. This holding cannot be reconciled with *Martin v. Wilks*, 490 U.S. 755, 763 (1989), which holds that awareness of a pending lawsuit is not of itself notice adequate to bind an absent party. *See* Petition at 18. Respondents do not even attempt to argue otherwise (RB at 6).

Thus, if "virtual representation" and "the incentive to litigate" are constitutionally adequate representation, as the Eighth Circuit holds, then this case presents the question left unanswered in *Richards v. Jefferson Coun-*

ty, Ala., ___ U.S. ___, 116 S.Ct. 1761, 1766-67 (1996), namely, whether adequate representation can excuse a lack of notice, and, if not, what kind of notice is required.

The issue of whether petitioners can be bound by a prior judgment without notice and the opportunity to either opt in or opt out presents the fundamental due process issue that this Court sought to address in *Adams v. Robertson*, 95-1873 (March 3, 1997) (dismissing writ because issue not properly raised below), and *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (dismissing writ because issue was entirely hypothetical in that case). As this Court noted in *Adams*, the Court has a "continuing interest" (*Adams*, slip op. at 4, n. 6) in resolving the recurring constitutional issue of an individual's right not to be bound by an action to which he is, in no sense, a party. This case presents an excellent vehicle for resolving it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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